No. 05- (1)

Supreme Court, U.S.
FILED

05- 46 JUL 5 - 2005

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IN THE

Supreme Court of the United States

JAMES A. KAY, JR. and MARC D. SOBEL,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Communications Commission ("FCC" or "Commission"), in a license revocation proceeding, rejected an Administrative Law Judge's ("ALJ") determination that Marc D. Sobel ("Sobel") and James A. Kay, Jr. ("Kay") testified candidly and credibly in matters relating to their fitness to hold certain radio licenses. The Commission accorded no deference to the ALJ's candor and demeanor findings and failed to articulate a valid or record-based rationale for its failure to do so.

The question presented is:

> In an Administrative Procedure Act ("APA") adjudication on the record where witness credibility and demeanor are central to the outcome, do sections 8(a) and (b) of the APA, 5 U.S.C. § 557(b), (c), require an agency, when reviewing an ALJ's credibility and demeanor findings, to defer to those findings or provide a record-based and valid explanation of the agency's disagreement with those findings.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner, James A. Kay, Jr. is an individual who presently holds land mobile licenses in the 800 MHz band authorized by the FCC under 47 C.F.R. Part 90. Petitioner Marc D. Sobel is an individual who presently holds land mobile licenses in the 800 MHz band authorized in accordance with 47 C.F.R. Part 90. The FCC is the agency of the United States authorized by 47 U.S.C. § 312 to grant and revoke the licenses held by Kay and Sobel.

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Kay and Sobel respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 396 F.3d 1184. Appendix A at 1a.

The orders of the court of appeals denying rehearing and rehearing en banc are unreported. Appendix K and Appendix L at 346a, 347a.

The initial decision of ALJ John M. Frysiak in Sobel's case is reported at 12 FCC Rcd 22879. Appendix J at 301a.

The initial decision of Chief ALJ Joseph Chachkin in Kay's case is reported at FCC 99D-04, 1999 WL 700534. Appendix I at 163a.

The FCC's decision in Sobel's case is reported at 17 FCC Rcd 1872. Appendix G and Appendix H at 109a, 156a.

The FCC's decision in Kay's case is reported at 17 FCC Rcd 1834. Appendix F and Appendix H at 45a, 156a.

The opinions and orders of the FCC denying reconsideration in Sobel's case are reported at 17 FCC Rcd 8562. Appendix B, Appendix D and Appendix E at 14a, 36a, 44a.

The opinion and order of the FCC denying reconsideration in Kay's case is reported at 17 FCC Rcd 8554. Appendix C and Appendix E at 23a, 44a.

STATEMENT OF JURISDICTION

The judgment of the District of Columbia Circuit was issued on February 1, 2005. App. A. Timely petitions for rehearing and rehearing en banc were denied April 5, 2005. Apps. K and L. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The following authorities are set forth in Appendix M.

1. Sections 4–9 of the Administrative Procedure Act, 5 U.S.C. §§ 554-59. App. 349a to 362a.

2. Section 312 of the Communications Act of 1934, as amended, 47 U.S.C. § 312. App. 363a.

STATEMENT OF THE CASE

A. Introduction

Section 8(a) of the APA, 5 U.S.C. § 557(b), provides, in part, that in reviewing an ALJ's decision, "the agency has all the powers which it would have in making the initial decision." Noting "[this] rather obscure provision," this Court in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494 (1951), held that hearing officers (now called ALJs) hold an important place in the new APA regime of administrative adjudication and that their role "would be of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing." *Id.* at 496, *quoting* S. Rep. No. 752, 79th

Cong., 1st Sess. 24 (1945). Four years later, in *Federal Communications Comm'n v. Allentown Broad. Co.*, 349 U.S. 358, 364 (1955), this Court held that section 8(a) of the APA does not require an agency to accept an ALJ's credibility and demeanor findings unless they are "clearly erroneous."

Since those early years after the enactment of the APA, this Court mostly has been silent, and the territory between "clearly erroneous" and "of consequence" remains somewhat uncharted. The absence of an articulated and uniform standard against which agencies can judge the credibility determinations of their ALJs creates uncertainty among the agencies, confusion among the litigants, and now a disagreement among the courts of appeals. This standardless environment suggests also to agencies and the courts that they have the authority to re-find facts and re-determine demeanor and credibility judgments initially determined by an ALJ to a far greater extent than is intended by the APA.

This case highlights the perils of ALJ-based administrative adjudication in the absence of cogent and uniform rules governing agency review. Here, in two related cases, involving identical issues, intersecting parties and overlapping witnesses, two ALJs reached conflicting determinations. One ALJ, following a two-day hearing, in which two witnesses, Kay and Sobel, testified, concluded that the petitioner Sobel lacked candor in dealing with the agency. Two years later, another ALJ, after a ten-day hearing, in which sixteen witnesses, including Kay and Sobel, testified, determined that both petitioners were credible, opposing witnesses were not, and that the petitioners did not lack candor in their dealings with the agency. The second ALJ also determined that the bureau responsible for prosecuting both cases had engaged in misconduct in both

proceedings and misled the ALJ in Sobel's case. Faced with conflicting ALJ determinations, the Commission announced that it would ignore both, including the explicit credibility and demeanor findings of the second ALJ. The Commission failed to articulate any valid reason for declining to defer to the credibility and demeanor findings of the second ALJ. The court of appeals affirmed without assessing whether the Commission's refusal to consider the credibility findings of the second ALJ was supported by the record and a valid rationale articulated by the Commission.

B. Background

1. The Communications Act of 1934 was enacted "to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. § 301. It created and vested the FCC with the authority to grant, renew, modify and, under certain circumstances, revoke licenses. 47 U.S.C. §§ 301, 309, 312. License revocation proceedings require notice to the licensee and a statement of the matters of interest to the FCC. 47 U.S.C. § 312(c). The Act also requires a hearing and imposes on the Commission the burden of proceeding with the introduction of evidence and the burden of proof. *Id.* § 312(d). Finally, the Act provides that the Administrative Procedure Act, 5 U.S.C. § 558(c)(1) and (2), *incorporating* 5 U.S.C. §§ 556 and 557, shall apply to any proceeding for revocation of a license or permit or any proceeding for the issuance of a cease and desist order. 47 U.S.C. § 312(e).

2. Petitioner James A. Kay has been providing commercial two-way mobile radio service in the Los Angeles,

California area since the early 1980s. He holds 152 land mobile licenses authorized by the FCC, operating in both the 800 MHz and 470-512 MHz bands. Petitioner Marc Sobel is a radio dealer, who sells and services two-way radios, provides repeater service, installs and maintains systems for users and other dealers, and provides consulting services. Although he initially operated solely in the UHF bands, in the early 1990s, Sobel applied for and received 800 MHz licenses. Kay and Sobel have been friends for many years and when Sobel developed an interest in the 800 MHz band, Kay helped Sobel apply for and implement his facilities, first under an oral agreement, then pursuant to a written management agreement, dated October 28, 1994, and later under an Amended Radio System Agreement, dated December 30, 1994.

3. On December 13, 1994, the FCC initiated license revocation proceedings against Kay. More than two years later, on February 12, 1997, the FCC instituted license revocation proceedings against Sobel. Kay intervened in the proceedings against Sobel. The hearing in Sobel's case took place on July 29 and 30, 1997, before ALJ John M. Frysiak. Only Sobel and Kay testified. On November 28, 1997, Judge Frysiak issued an initial decision ordering the revocation of Sobel's licenses and denying his pending applications. App. 301a. Judge Frysiak decided that Sobel's failure to make voluntary disclosure of the Management Agreement to the Commission and his failure to disclose the Management Agreement until July 1996, was "egregious in that it was wilful [sic], repeated and continued throughout the hearing." App. 344a, ¶ 78. From this, the judge decided that Sobel "intended to mislead and deceive the Commission with respect to Kay's actual role in the affairs of Sobel's 800 MHz stations" and "[r]evocation of all Sobel's licenses is

mandated." App. 344a, ¶¶ 77, 78. The Management Agreement had been disclosed, however, and the bureau that prosecuted the case knew it. The bureau not only failed to alert the ALJ to that fact, it affirmatively concealed that fact from the ALJ.

4. A different ALJ, Chief Administrative Law Judge Joseph Chachkin, heard Kay's case almost two years later, in a ten-day hearing involving the testimony of sixteen witnesses. Yet again, both Kay and Sobel testified, but unlike Judge Frysiak, Judge Chachkin found that both Kay and Sobel "answered questions put to them in a candid and forthright manner. Their testimony that they did not intend to deceive the Commission concerning their business dealings is entirely credible and is accepted." App. 268a, ¶ 173. *See also* App. 296a, 297a, ¶¶ 216, 218. He further found that "their testimony is buttressed by the evidence showing that Kay informed the Commission of their business relationship long before any questions were raised by the Bureau." App. 268a, ¶ 174. The judge found that Kay and Sobel did not intend to conceal their business arrangement from the Commission and that they had no motive to do so.[1] App. 294a, ¶ 213. Judge Chachkin found that "Judge Frysiak's decision was tainted" because on at least seven occasions, "the Bureau deliberately concealed the fact that Kay had given a copy of the Management Agreement to the Bureau on March 24, 1995." App. 263a-265a, ¶ 169. *See also* App. 292a at ¶ 210. The judge noted that he had "never seen prosecutorial misconduct of this magnitude in

[1] There is no basis for finding a motive to mislead the Commission because there is no limit to the number of 800 MHz licenses that a person or entity may own and therefore no reason to conceal ownership arrangements.

the twenty years he has presided over Commission cases." *Id.* n.49. For this reason, he explained that "Judge Frysiak's conclusion must be disregarded in determining Kay's fitness to be a licensee." App. 292a, ¶ 210. He decided that the Bureau's conduct in this case was unreasonable and that the lack of candor issue "contrived by the Bureau, is without substance." App. 295a, ¶ 214. Among other things, he concluded that the Bureau impermissibly "was engaged in a fishing expedition with the hope that something would turn up," that its request for documents from Kay was "extremely broad," and "arbitrary and unreasonable," that it showed an "unreasonable unwillingness to narrow its request," an unreasonable refusal to assure confidentiality of Kay's response, and irrationally and without explanation demanded fifty copies of Kay's response. App. 272a, 274a, ¶¶ 179, 181. On all other issues designated for hearing, the Bureau either agreed that there was no violation, App. 291a, ¶ 208, or Judge Chachkin found that the Bureau had not satisfied its burden of proof, App. 275a, 285a, 290a, 291a, 294a, 295a, ¶¶ 182, 199, 207, 209, 213, 214. Therefore, Judge Chachkin concluded that Kay was qualified to remain a licensee. App. 300a, ¶ 223.

5. Both cases proceeded to the FCC for review, and the Commission, on its own motion, considered the two proceedings together, but rendered separate, divided decisions in each case. Apps. F, G, and H. The FCC stated that it "considered the fact that Chief Judge Chachkin and Judge Frysiak reached inconsistent conclusions about the credibility of Kay and Sobel," but "decided not to defer to either ALJ." App. G at 117a, ¶ 10; App. F at 94a-96a, ¶¶ 86-87. The Commission did not, however, take testimony from Kay or Sobel or anyone else. Instead, after reading Kay and Sobel's testimony before Judge Frysiak, the Commission

discounted or rejected that testimony on some issues, App. G at 135a, 149a-150a, ¶¶ 49, 74, 75, and decided that Sobel's and Kay's testimony concerning their various roles in the stations at issue was "unpersuasive," *id.* at 125a, ¶ 22. *See also id.* at 131a, 146a, 149a, ¶¶ 38, 70, 75. Therefore, in Kay's case, the Commission disagreed with the ALJ's findings concerning the adequacy of Kay's response to the Commission, the ALJ's treatment of confidentiality, whether Kay lacked candor, and whether Judge Frysiak's decision was tainted by his reliance on the erroneous belief that Kay and Sobel did not disclose their Management Agreement to the Commission until July 1996. App. F at 67a, 71a, 75a-76a, 94a-96a, 103a, ¶¶ 40, 44, 48-50, 86-88, 98 n.23. According to the Commission, Judge Chachkin's findings concerning Kay and Sobel's credibility

> are not entitled to deference . . . in view of the fact that Judge Frysiak, who heard essentially the same testimony in the *Sobel* proceeding, clearly did not find these witnesses credible. We believe that the existence of these conflicting findings bears on whether such findings are supported by substantial evidence. . . . In view of the apparent conflict between the two judges' assessment of the witnesses' credibility, we did not defer to either ALJ but based our decision on our own independent assessment of the nature of the representations made and the circumstances that were involved.

Id. at 94a-95a, ¶ 86. Having invoked its "power of de novo review," the Commission declared that an additional hearing "would be wasteful and time consuming." According to the Commission, a new hearing would only result in "conflicting

credibility determinations that the Commission would have to resolve" so the Commission instead evaluated the witnesses' credibility without the benefit of seeing the witnesses with its own eyes. *Id.* at 95a, ¶ 86 n.18. Thus although the Commission found explicitly that the record did not sufficiently demonstrate that Kay had a motive for abusing the Commission's processes, *id.* at 86a, ¶ 70, it revoked both Kay and Sobel's licenses in the 800 MHz band, *id.* at 107a, ¶ 108; App. G at 154a, ¶ 86.

FCC Commissioner Kevin Martin dissented. In a Consolidated Separate Statement, he stated that the Commission had gone "too far in reversing Judge Chachkin's conclusions." App. H. Commissioner Martin was

> unwilling to approve, based on the conflicting and confusing record before us, the determination that James A. Kay, Jr. improperly failed to respond to requests for information and that Kay and Marc Sobel lacked candor in filings they made to the Commission. In the information request decision, the Commission reverses an ALJ's explicit findings that Kay acted reasonably in the face of a demanding inquiry by the Bureau—findings that are ordinarily accorded great deference. In the lack of candor decision, upon which two ALJs reached opposite conclusions, the Commission essentially sides with the first ALJ, even though he did not have accurate information on all of the relevant facts. In my view, the Commission does itself a disservice by making these decisions on the cold record before it. At the very least, the Commission should have

> referred this proceeding to a new ALJ to reconcile the conflicting decisions and make definitive findings.

Id. at 156a. Similarly, Commissioner Martin stated he was "unable, on the record before us, to reconcile the ALJs' conflicting decisions and determine that Judge Frysiak was not misled." *Id.* at 161a. He challenged the Commission's conclusion that Judge Frysiak would not have made a different decision had he known Kay and Sobel had provided the Bureau with a copy of the Management Agreement long before their candor was an issue, finding it impossible to reach such a conclusion on the ALJ's state of mind on the record before it. *Id.* at 161a n.1. He concluded: "Particularly given the severity of the sanctions at issue, I would not find that Kay and Sobel lacked candor." *Id.* at 161a.

All of the parties filed for reconsideration. On May 8, 2002, the Commission denied Kay's request and granted the Bureau's request. App. C. In reaffirming its decision to find that Kay lacked candor without relying on any ALJ's assessment of Kay's and Sobel's credibility, the Commission commented:

> This case is unusual in that evidence regarding the transfer of control and the lack of candor issues were heard by two different ALJ's: Chief Judge Joseph Chachkin in WT Docket No. 94-147 and Judge John M. Frysiak in WT Docket No. 97-56. Chief Judge Chachkin found that Kay and Sobel were truthful, while Judge Frysiak reached the opposite conclusion. Decision at ¶¶75-76, 78-79. In view of the fact that two ALJ's, each of whom had an opportunity to observe the witnesses

> reached contrary conclusions, the Commission, did not defer to either of them in resolving the issues, but rather relied on its own independent review of the full record in both cases. *Id.* at ¶¶ 86-91.

Id. at 30a, ¶ 7. Judge Frysiak made no explicit findings concerning credibility or demeanor; only Judge Chachkin did. The Commission, however, interpreted the outcome in Sobel's case as an implicit finding of lack of credibility by the ALJ. The Commission then reaffirmed its belief that Judge Frysiak's "conflicting findings" were consistent with its own de novo review of the record as a whole and bore "on whether Chief Judge Chachkin's findings are supported by substantial evidence." The Commission added:

> Just as we would not arbitrarily ignore an ALJ's credibility findings, we do not feel justified in ignoring the fact that a conflict exists between two experienced administrative law judges both of whom observed the witnesses. We also believe that the "cold" record in this case contains sufficient circumstantial and testimonial evidence for us to make reliable findings on the material questions of fact. We therefore decline to defer to Chief Judge Chachkin's credibility findings.

Id. at 31a-32a, ¶ 8 (footnote omitted).

On the same day, the Commission summarily denied a petition for reconsideration of the decision in Sobel's case and on January 15, 2004, the Commission denied a petition for reconsideration of the May 8, 2002 decision relating to the Commission's denial of a request by Sobel for an

investigation into the Bureau's conduct in this case. App. B, App. D. Commissioner Martin again filed a consolidated separate statement reiterating his disagreement with the determinations that Kay and Sobel lacked candor and restated his belief that a hearing in front of a new ALJ was required. App. E.

On February 1, 2005, the D.C. Circuit affirmed, holding that substantial evidence supported the Commission's decision. After reviewing the general standard of review, the D.C. Circuit recognized the problem presented in this case:

> Here, of course, the Commission faced conflicting findings by two ALJs who heard essentially the same testimony. Kay and Sobel stress that only ALJ Chachkin made express credibility determinations. This is true, but it does not render his findings more deserving of credit. As the Commission recognized, ALJ Frysiak's findings clearly rested on his disbelief of Kay's and Sobel's testimony.

App. A at 11a. The circuit court held that under 5 U.S.C. § 557(b), the Commission was not required to adopt the credibility determinations of an ALJ, and although the agency could give "much weight to an ALJ's credibility determinations, the question for the reviewing court remains the same whether the agency agrees or disagrees with the ALJ—is the agency's decision supported by substantial evidence." *Id.* at 10a. The court found the Commission's findings were so supported. On April 5, 2005, the court denied rehearing. App. 346a, 347a.

REASONS FOR GRANTING THE PETITION

A. There is No Clear Consensus Among the Circuits

In *Allentown*, this Court rejected, as too high, the "clearly erroneous" standard that the court of appeals used to assess the agency's decision to accept or reject an ALJ's credibility findings. No alternative standard was proposed.

Although a uniform standard of agency review has remained elusive, especially absent guidance from this Court, the courts of appeals, until now at least, have fashioned a rough, albeit standardless, consensus worded in varying ways that "when the ultimate determination of motive or purpose hinges entirely upon the degree of credibility to be accorded the testimony of interested witnesses, 'the credibility findings of the [ALJ] are entitled to special weight and are not to be easily ignored.'" *Ward v. NLRB*, 462 F.2d 8, 12 (5th Cir. 1972) (quoting *Russell-Newman Mfg. Co. v. NLRB,* 407 F.2d 247, 249 (5th Cir. 1969)). An agency is certainly permitted to disregard an ALJ's findings on credibility or demeanor, but can only do so if the agency "fully articulate[s] [its] reasons for so doing, and then, with heightened scrutiny, [the court] must decide whether such reasons find support in the record." *Aylett v. Sec'y of Hous. and Urban Dev.*, 54 F.3d 1560, 1566 (10th Cir. 1995); *see Haebe v. Dep't of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002) (holding that if the agency's "reasons for overturning demeanor-based credibility determinations are not sufficiently sound, its decision does not survive substantial evidence review");[2] *Morris v. Commodity Futures*

[2] The Merit Systems Protection Board, the agency in *Haebe*, was created by and operates pursuant to the Civil Service Reform Act of 1978, Public L. No. 95-454, 92 Stat. 1111 *et seq.*, codified, as (Cont'd)

Trading Comm'n, 980 F.2d 1289, 1294 (9th Cir. 1992) (recognizing that an agency can disagree with an ALJ's credibility determination, but it needs a good reason); *Carlisle Area School v. Scott P.*, 62 F.3d 520, 528 (3d Cir. 1995), *cert. denied*, 517 U.S. 1135 (1996) (holding that "credibility-based findings [of a hearing examiner] deserve deference unless non-testimonial, extrinsic evidence in the record would justify a contrary conclusion"); *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 n.27 (11th Cir. 1995) (noting that "courts of appeals apply a heightened standard of review where the ALJ and the Commission disagree"); *Pennzoil Co. v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (stating that courts engage in "heightened" review when the Commission rejects an ALJ's credibility determinations).

No matter what words are used by courts of appeals to articulate their respective tests, one theme emerges: an agency must defer to the credibility and demeanor findings of the hearing examiner who heard and saw the witnesses testify, unless there is a sound and specified reason articulated by the agency and supported by the record to do otherwise. This test serves a number of salutary purposes. First, it accommodates two important principles explicit in the APA: the right of a party, especially in a license revocation proceeding, to a meaningful on-the-record and live hearing including cross-examination, before an ALJ, and the right of the agency, where appropriate, to disregard the determinations

(Cont'd)

amended, in various sections of Title 5, United States Code ("CSRA"), including 5 U.S.C. § 7701 *et seq*. The relevant judicial review provisions in CSRA closely track those in the APA. *Compare* 5 U.S.C. § 7703(c)(1), (2), and (3) and 5 U.S.C. § 706(2)(A), (D) and (E), respectively.

of their ALJs. Second, it recognizes the special role of ALJs in administrative adjudications. These first-tier fact-finders, insulated from the political and bureaucratic pressures that might otherwise influence agency decision-making, are, according to Learned Hand, in a unique position to "take into consideration the whole nexus of sense impressions which they get from a witness" and which are lost in a transcript. *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952); *see Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946) (opining on the importance of live testimony in assessing demeanor and credibility).

In this case, the court of appeals ignored this common sense approach to assessing an agency's decision to disregard the credibility findings of an ALJ. Instead, the court concluded that "an agency is not required to adopt the credibility determinations of an administrative law judge[,]" and there was no need to even assess whether the agency's decision to disregard the findings of the ALJ was reasoned and supported by the record. App. A at 10a. According to the court, "[t]his much follows from § 557(b) of the APA [5 U.S.C. § 557(b)]: 'On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision,'" including, by implication, the power to make credibility determinations on a paper record. *Id.* The court reasoned that since this Court "rejected the idea that an agency must accept an ALJ's [credibility] findings unless those findings are clearly erroneous," the agency is therefore free to disregard those findings for any reason or no reason at all. *Id.* at 10a-11a.

The well accepted duty of explanation that comes with a decision to reject an ALJ's credibility and demeanor findings is abandoned by the court below. In contrast, under the views

shared by the Third, Fifth, Seventh, Tenth, Eleventh and Federal Circuits, an agency's freedom to reject an ALJ's credibility determinations is conditioned on whether the decision to do so is supported by the record and a reasoned explanation.[3] *See generally* Pierce, 2 ADMINISTRATIVE LAW TREATISE § 11.2 (4th ed. 2002). The court of appeals in this case eliminated those conditions precedent as superfluous. The only reason offered by the agency here for disregarding the ALJ's credibility determinations in the *Kay* proceeding was that the ALJ in the *Sobel* proceeding had reached a different determination. That, however, is not a reason based on the record in the *Kay* proceeding or for that matter, the record in any proceeding. The court of appeals had no good reason much less good law on which to excuse the agency from its APA-imposed duty of explanation. *See* 5 U.S.C. § 557(c).

In the court of appeals' view, the correct focus should not be on the rationale underlying the agency's rejection of

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[3] The D.C. Circuit did not affirm the FCC's conclusion that contradictory findings in separate cases may be resolved by ignoring the record supporting those findings as a per se rule, but instead combed the record of both Kay's and Sobel's cases in a search of substantial evidence, noting "[a]t the least, the Commission could find that the statements they [Kay and Sobel] filed were misleading and intentionally so." App. A at 12a. This was not, however, the basis for the Commission's decision and fails to review properly the Commission's fairly obvious refusal either to evaluate the ALJs' decisions in light of the record as a whole or to apply a correct legal standard to the review of demeanor and credibility determinations in an APA adjudication. The circuit court's finesse in one sense exceeds the court of appeals' authority by making its own findings on credibility and demeanor and by not examining the reasons why the Commission acted as it did, but also attempts to avoid the important question of administrative procedure that is squarely presented here.

the ALJ's credibility determinations, but rather on whether the agency's "decision is supported by substantial evidence." *Id.* Not only does this approach represent a significant departure from the way in which this Court and the courts of appeals in other circuits have approached the issue, it represents a significant break with courts, commentators, and the Executive Branch in their interpretation of the APA.[4] The Attorney General has provided a careful rationale for decisional processes in the APA and the defined relationship between the agency head (or commission) and the agency's hearing examiner. In the view of the Attorney General, administrative adjudication involves two principal components: (1) a decision at an evidentiary hearing by the a hearing examiner (*i.e.*, ALJ) who is structurally insulated from the agency; and (2) the agency control over policy, exercised largely through the agency's own review of ALJ decisions. The Attorney General's analysis of section 557(b) states: In "cases ['which depend on the determination of the credibility of witnesses as shown by their demeanor'], it is apparently assumed that agencies will attach considerable weight to the findings of the examiner who saw and heard the witnesses." Attorney General's Manual on the Administrative Procedure Act 84 (1947) (quoting from S. Rep. 752, 79th Cong., 1st Sess. 24 (1945)). Accordingly, "administrative law judge determinations of credibility will generally be respected." *See also* Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an*

[4] This is not the first time that the District of Columbia Circuit has ignored the distinction between findings of fact based on credibility and findings based or designed to implement certain policy objectives. In *Swan Creek Communications, Inc. v. F.C.C.*, 39 F.3d 1217, 1221 (D.C. Cir. 1994), the court held that "the Commission is not bound by the ALJ's findings so long as its own findings are supported by substantial evidence."

Alternative Agency Structure, 66 NOTRE DAME L. REV. 965, 982 (1991). In Kay and Sobel's cases, neither the agency nor the court of appeals paid any respect to the ALJ determinations of credibility, or attached any weight or paid any special heed to those findings.

This Court should step in to resolve the conflict between the court below and the FCC, which seem aligned in support of a "no standard" standard and the many authorities to the contrary. Under the D.C. Circuit's view, section 557(b) relieves an agency of the burden of conducting record based review of an ALJ's demeanor findings or of explaining itself.

B. The Court of Appeals' Decision Undermines the Scheme of Hearing and Review Contemplated by the Administrative Procedure Act

The text and context of Section 8 of the APA, 5 U.S.C. § 557, as well as the contemporary history of its provisions reveal an unmistakable intent to require agencies with review authority over ALJ findings to accord more deference to an ALJ's credibility and demeanor determinations than was accorded here. Here, the FCC ignored the record made in both Sobel's and Kay's cases and concluded that the contradictory candor findings made by the two ALJs relieved the FCC of the obligation to review either record at all or defer to the express credibility and demeanor findings rendered by either one of the two ALJs. The decision to discard all demeanor findings is, therefore, off the record and plainly incompatible with the mandate that all aspects of a decision must be supported by the record and that the parties have an undeniable right to know the contents of the record in their cases. *See* 5 U.S.C. §§ 556(d), (e); 557.

The APA mandates a very different approach than the FCC's; the APA's authors have said so:

> The provision that on initial agency review of initial examiners' decisions it [the agency] has all the powers it would have had in making the initial decision itself does not mean that initial examiners' decisions or recommended decisions are without effect. They became part of the record and are of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing. In a broad sense the agencies reviewing powers are to be compared with that of courts under section 10(e) of the bill.

Administrative Procedure Act Report of the House Comm. on Judiciary on S. 7., 79th Cong. 2d. Sess. (1946), ordered to be printed as *Administrative Procedure Act Legislative History*, 79th Cong. 1944-46, at 272-73 (1946); *see also id.* at 210.

The Attorney General's Manual reinforces Congress's expectation that credibility and demeanor determinations will be accorded "considerable weight." Attorney General's Manual on the Administrative Procedure Act at 84 (1947).[5]

The FCC did not conceal its refusal to consider the demeanor findings of either ALJ. It held that the findings

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[5] This Court considers the Attorney General's Manual an authoritative source in interpreting the provisions of the APA. *Darby v. Cisneros*, 509 U.S. 137, 148 n.10 (1993).

cancelled each other out notwithstanding that each ALJ heard different cases and presided over the construction of different records. The FCC's reasoning falls short of the required record review and reveals an undeniable belief on the part of the FCC that it is required neither to weigh nor consider the credibility and demeanor findings of either ALJ on the merits nor is it bound by any legal constraints or standards in abandoning those findings.

That surely was not what was intended by the authors of the APA and is not in keeping with the well-established premise that an agency faced with the prospect of rejecting an ALJ's credibility and demeanor findings may do so only if a valid reason is articulated, explained and supported by the record. From the beginning of this Court's APA jurisprudence, it has been recognized that a principal reason for the enactment of the APA is to enhance "the status and function of the trial examiner." *Universal Camera Corp.*, 340 U.S. at 494. The majority opinion in *Universal Camera* recognizes also that credibility and demeanor findings of experienced hearing officers are highly important evidence in cases where those factors are relevant, and that they must be given the weight and significance they deserve to ensure a "rational inquiry into truth." *Id.*, 340 U.S. at 496-97. Neither the FCC nor the court below met this elementary standard.

While *Allentown* identifies a standard that exceeds the upper limit of the degree of respect due the credibility and demeanor findings of ALJs, the courts of appeals properly have observed that much more than no respect is the correct standard to apply. *See e.g.*, *Carlisle Area School*, 62 F.3d at 528 (analogizing the standard of review of credibility findings to the standard in Rule 52(a) of the Federal Rules of Civil Procedure, which provides "due regard shall be given to the opportunity of the trial court to judge the credibility of the

witnesses");[6] *Mattes v. United States*, 721 F.2d 1125, 1129 (7th Cir. 1983) ("[T]he ALJ's determinations are not entitled to any special deference from the agency except insofar as the ALJ's findings are based on witness credibility determinations.").

Similarly, the courts consistently have applied a "good reason" standard to an agency's refusal to accept credibility and demeanor determinations. *See e.g. Elliott v. Commodity Futures Trading Comm'n*, 202 F.3d 926, 937 (7th Cir. 2000); *Parker v. Bowen* 788 F.2d 1512, 1520 (11th Cir. 1986) (citing 5 U.S.C. § 557(b)); *JCC Inc.*, 63 F.3d at 1566 (same); *Illinois v. United States*, 666 F.2d 1066, 1073 (7th Cir. 1981) (holding "(c)ourts are no longer satisfied with bare administrative ipse dixits. . . . Although the agency certainly may draw a differing conclusion, it is important for the agency to clearly explain the nature and rationale of its differing conclusion") (collecting authorities); *Pennzoil*, 789 F.2d at 1135.

Other authorities uniformly reinforce the judicial recognition that agencies have no right of nullification of ALJ credibility and demeanor findings. In an address to a gathering of ALJs, Judge Patricia Wald said,

> When you base your findings clearly on the credibility or demeanor of witnesses, you are at

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[6] *See Anderson v. Bessemer City*, 470 U.S. 564, 576 (1985) ("When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference . . . . for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." (citation omitted)). It is hard to see a rationale for the belief that the truth-seeking exercise under Rule 52 must be different than that conducted in an APA proceeding. No agency has a protected interest in disregarding truthful information without any explanation.

> the zenith of power, even when there are conflicting stories.

Patricia M. Wald, *Some Thoughts On Beginnings and Ends: Court of Appeals Review of Administrative Law Judges Findings and Opinions*, 67 WASH. U. L.Q. 661, 667 (1989); *see also* Gifford, *supra* at 982; ADMINISTRATIVE LAW TREATISE, *supra*. *See also* Associate Justice Tom C. Clark, *Administrative Justice 1960*, 13 ADMIN. L. REV. 6, 8 (1960-61) ("As early as 1951, Dean Pound gave an interesting lecture on his distrust of administrative agencies. It might be summed up in his simple sentence, 'Perhaps the most serious [criticism] is a tendency to decide without a hearing, or without hearing one of the parties, or by a mere appearance of a hearing—going through the appearance of one, the results having been predetermined.'"). Justice Clark promised that the Court would know how to deal with this case when it came along. *Id.*

There has not been a great deal of debate over the correct standards to apply to ALJ credibility and demeanor findings, and surely, even in *Allentown*, this Court had no intention to launch a standardless principle awarding agencies carte blanche to do whatever they wanted. Yet here, the FCC, for no good reason, refused to consider whether the ALJs' findings in both Kay's and Sobel's cases were appropriate in light of the record as a whole. The Commission simply discarded both findings notwithstanding whatever was in the record. The court of appeals affirmed and in so doing

sanctioned an utterly arbitrary approach that is far out of step with the APA, its history and its jurisprudence.

C. Fundamental APA Principles Are Implicated

Congress enacted the APA to encourage uniformity in administrative practice for all agencies and to foster a comprehensive set of standards and principles applied "across the board" to enforce a high degree of adjudicatory discipline and fairness, in agency adjudications. *See Steadman v. SEC*, 450 U.S. 91, 96 (1981); *Director OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). The APA is one of the very few statutes that precludes its own supercedure except by express congressional action. 5 U.S.C. § 559.

The Commission's departure from the long-standing norm in reviewing credibility and demeanor determinations by an ALJ departs also from the purposes of the APA and suffers from the additional defect of being unjustified. There hardly is a legally principled justification for discarding an ALJ's credibility and demeanor findings without much attempt at a reasoned explanation, especially on the meager and non-record pretext suggested by the Commission here.

It is no answer within the APA scheme for the reviewing court to tramp around in the record in search of substantial evidence not relied upon by the agency.[7] That is precluded

[7] The Commission's brief in the court of appeals searched the record for evidence but this post hoc rationalization of counsel is not a proper focus of the court of appeals review of the Commission's decision. *Motor Vehicles Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 50 (1983) ("[A]n agency's action must be upheld if at all, on the basis articulated by the agency itself.").

by general principles of appellate review, *see SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943), and the exercise itself virtually precludes substantial evidence review. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997) (failure of the factfinder or review board to consider all relevant and material evidence under a correct legal standard precludes substantial evidence review). *See also Elliott*, 202 F.3d at 940 (Easterbrook dissenting). It is all the more troubling in a case like Kay's, where the ALJ found prosecutorial misconduct by agency personnel, a finding that also is simply disregarded without explanation by the Commission.

The absence of standards reflected in the Commission's decision and by implication in the court of appeals' affirmance of it, effectively relieves the agency of its burden of proof in a matter as serious as a license revocation proceeding, and in a very real sense deprives license holders of their statutory rights to a full and fair revocation hearing before their licenses may be revoked. *See* 5 U.S.C. § 558(c); 47 U.S.C. § 312.

The body of administrative law would benefit from a uniform consistent legal standard for determining when a reviewing agency subject to the APA may downgrade or discard an ALJ's credibility and demeanor findings. The FCC's decision suggests a preference for no standard or absolute de novo consideration, a premise that was considered and rejected by the Congress sixty years ago. The Court of Appeals decision suggests its concurrence in the "no standard" test. The matter is important enough to merit this Court's completion of the unfinished analysis undertaken in *Allentown* fifty years ago.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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